Moeller Aerospace Technology, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–CA–48929

July 31, 2006

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On March 23, 2006, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a limited cross-exception, a supporting brief, and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that Supervisor Davidson's statement prohibiting employee Andersen from soliciting signatures for a union petition on "company time" and during "working hours" violated Sec. 8(a)(1). We do not, however, agree with the judge's implicit characterization of Davidson's prohibition as the promulgation of an unlawful rule. We find, rather, that it was simply an unlawful statement to the employee. We shall revise the judge's recommended Order accordingly and substitute a new notice in conformity with the Order as modified. In light of our adoption of the judge's finding of the unlawful statement, we find it unnecessary to pass on the General Counsel's cross-exception concerning the judge's failure to find, alternatively, that the Respondent violated Sec. 8(a)(1) by disparately enforcing its no-solicitation/no-distribution policy.

Contrary to his colleagues, Member Walsh would find merit in the General Counsel's cross-exception. Member Walsh would find that the Respondent discriminatorily enforced a no-solicitation policy when it prohibited employee Andersen from soliciting signatures on a union petition during working time while allowing employees to engage in other forms of solicitation during working time.

In adopting the judge's finding that the Respondent unlawfully threatened to discharge employee Swarthout, we do not rely on the judge's finding that the employee's belief that his son-in-law was discharged for union activity could have resulted in the employee reasonably construing the supervisor's remark to mean that he would also be discharged if he continued to support the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Moeller Aerospace Technology, Inc., Harbor Springs, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(a) and reletter the remaining paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 31, 2006

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P.Walsh Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
The National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your activities.

WE WILL NOT threaten you with plant closure and loss of jobs if you select the union as your exclusive bargaining representative.

WE WILL NOT threaten you with discharge for placing union placards in your vehicles or for engaging in any other protected activity.

WE WILL NOT prohibit you from engaging in Union-related solicitation during nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

MOELLER AEROSPACE TECHNOLOGY, INC.

Michael Silverstein, Esq., for the General Counsel.
Andrew Baran, Esq., for the Respondent.
Diana Ketola, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Petoskey, Michigan, on January 30, 2006, following the issuance of a complaint[1] by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on December 30, 2005.[2] The complaint, as amended at the hearing, alleges that Moeller Aerospace Technology, Inc. (the Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interrogating an employee about his union activity, ordering an employee to remove a prounion petition from his toolbox, and threatening employees with discharge and plant closure if they supported the Union or chose the Union as their bargaining representative.[3] On January 5, 2006, the Respondent filed an answer to the complaint denying any wrongdoing.

All parties at the hearing were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the manufacture of punch retainers and components for the aircraft engine and power generation industry at its facility in Harbor Springs, Michigan. During 2005, a representative period, the Respondent received gross revenues in excess of $500,000, and, during the same period, received at its above facility products, goods, and materials valued in excess of $50,000 from firms located outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

The Respondent, as noted, manufactures parts for aerospace industries, and is the primary manufacturing arm of a larger Moeller Manufacturing organization. It is partially owned by Daniel Moellering, its president.[4] William McQueen holds the position of leader at the Respondent's facility, and David Davidson the position of assistant inspection leader. Both McQueen and Davidson are admitted supervisors and agents of the Respondent as defined by the Act.

Sometime during the end of August, the Union began an organizing drive among Respondent's employees. Moellering claims he first became aware of the Union's organizing campaign at around that time from a couple of his leaders. (Tr. 88.) On hearing about the Union's drive, Moellering held a meeting with his supervisors in late August, during which he distributed literature he had left over from a prior union campaign on what supervisors could and could not do during the Union's campaign (see RX-1). Additional material was distributed to his supervisors on September 1 (RX 2–3). Mollering testified that at the late August supervisors meeting, he explained what was permissible and not permissible activity, and recalls specifically explaining that interrogating employees about their union activity, threatening them, or telling them that the plant might close, were not permitted.

McQueen recalls attending a supervisors' meeting called by Moellering in late summer or fall to discuss the Union's organizing campaign. At the meeting, the supervisors were informed that some union activity was taking place, and were given information that had been used during the previous union campaign on what they could or could not do or say to employees during the Union's campaign. Copies of no-solicitation/no-distribution rules were also distributed. The no-solicitation rule provides that supervisors "may not prevent talk about unions (for or against) while employees are on non-working time, and defines non-working time as including, "break times, rest room visits, lunch breaks, wash-up time, before or after shift-time." The no-distribution rule states that "employees may distribute literature about unions in non-work areas only during non-work times," and applies to "all non-company literature, whether pro or anti-union." (see RX-2).

Davidson was not present at the supervisors' meeting. He did, however, attend a subsequent meeting with a consultant,

[1] The charge and amended charge giving rise to the complaint were filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (the Union), respectively on September 16, and November 1, 2005.

[2] All dates are in 2005, unless otherwise indicated. Reference to testimonial evidence is identified herein by the transcript (Tr.) page number. Exhibits are referred to as either "CGX" for a General Counsel exhibit, or "RX" for a Respondent exhibit. Reference to arguments or positions made by the parties in their posthearing briefs are identified as "GCB" (General Counsel's brief) or "RB" (Respondent's brief) followed by the page number.

[3] At the conclusion of his case, the General Counsel withdrew pars 7(d) and 8 of the complaint, along with their corresponding conclusionary paragraphs, alleging, respectively, that the Respondent had also violated Sec. 8(a)(1) by refusing an employee's request to post a prounion document on a bulletin board, and Sec. 8(a)(3) and (1) of the Act by issuing a written reprimand to employee Thomas Meadows. (Tr. 57.)

[4] Although Moellering asserted at the hearing that he was part owner of the Respondent and held no other position (Tr. 86), in its answer to the complaint, the Respondent admitted, and I find, that Moellering serves as its president, and was, at all times relevant herein, a supervisor and agent of the Respondent within the meaning of Sec. 2(11) and 2(13) of the Act.

Walt Fitzhenry, who provided him with the literature distributed during the supervisors' meeting, including a copy of the "no-solicitation/no-distribution" rules. (Tr. 89; 66.) Davidson testified that under the rules, the distribution of literature in the work place is prohibited "during working hours," and allowed during an employee's "own time or off the clock." There is, however, nothing in Davidson's or Moellering's testimony, or for that matter elsewhere in the record, to indicate that copies of the no-solicitation/no-distribution rules were ever distributed, shown, or explained to employees.

Tim Andersen, employed as an inspector with the Respondent, testified about a conversation he had with Moellering about the Union in August or September, soon after the union's organizing drive began. He recalled Moellering telling him during this conversation that union cards were a very serious matter, and that signing one was tantamount to the grant of a power of attorney to the Union to negotiate on his behalf. Andersen further recalled seeing an authorization card posted on the Company's bulletin board earlier that day. When Andersen mentioned to Moellering that he had in the past belonged to the Union, Moellering purportedly replied that he (Moellering) had the right to either sign or not sign a contract with the Union. That was the extent of their conversation.

Anderson also testified that sometime in September, he learned that another individual, Pete Olson, was fired for supporting the Union. Olson is the son-in-law of employee Frank Swarthout. Andersen contends that during a union meeting, Olson's discharge was the subject of discussion, and that employees felt that Olson had been wrongfully terminated for his union activity. A petition was then drawn up opposing Olson's discharge, which Andersen circulated among employees for their signatures.[5] Andersen claims he brought the petition into facility at one point and placed it on top of his toolbox situated on his desk. According to Andersen, he did not circulate the petition at the plant but rather left it on his desk so that employees interested in signing it could readily do so. He believes he may have told employees about the petition being on his desk and telling them they were free to sign it if they wished. Fall

Andersen contends that, soon thereafter, he was approached by Davidson and told that Moellering wanted him, Andersen, to remove the petition from the facility (Tr. 49). Anderson told Davidson that he was not circulating the petition around the facility, but Davidson purportedly responded that he was only conveying what he had been instructed to do by Moellering. Andersen then took the petition off his toolbox and stowed it in his desk. Andersen testified, without contradiction, that private solicitation activity, and the distribution of nonwork-related literature, regularly takes place in the plant. He claimed, for example, that items such as Girl Scout cookies, Boy Scout popcorn, and candy bars are often sold inside the plant, noting that employees who engage in such activities typically pass around an order form during working time for employees to place their orders. He also described a betting pool engaged in by employees and supervisors alike during working time on payday which ran for about six weeks in 2005. (Tr. 51–52.)

Davidson recalled having a conversation with Anderson about the petition. He claims he first learned of the petition in late fall from Moellering, when the latter called him to his office and asked him to talk to Andersen about a claim that a petition was being passed around. Moellering did not say anything to Davidson as to when or where the petition was being circulated. According to Davidson, he then approached Andersen and told him that if he had a petition, that "he could not do it on company time, and he needed to put it away, put it in his toolbox, and he could do it on his lunch break or after his working hours." (Tr. 60.) Andersen purportedly replied that he was not passing it around, and that he would do it after working hours or at his lunch break. In his version of this conversation, Andersen made no mention of being told by Davidson that he could circulate the petition on his lunch break or after working hours, but not on company time. Davidson denied telling Andersen that he had been instructed by someone else to remove the petition from the building. (Tr. 60-61.) He further explained that the circulation of material during work time applies equally to union as well as antiunion literature. (Tr. 67.)

Moellering admits directing Davidson to inform Andersen that he could not distribute or circulate petitions on company time in work areas, explaining that he had previously received information from someone, whose name he did not recall, about Andersen circulating a petition over the firing of Olson. He claims that another employee who was circulating antiunion literature was likewise told to discontinue his activity. (Tr. 92–93.)

Andersen testified that he too observed antiunion literature being distributed inside the facility. He observed, for example, Connie Cutler, employed by Respondent as a quality engineering assistant, distributing antiunion literature at the timeclock as employees were punching out (Tr. 50). Called as a witness by the Respondent, Cutler admitted distributing antiunion literature on her own time to employees as they punched out at the end of their shift, and denied distributing any such literature in the work areas during work time. (Tr. 97–98.) Machine operator Bradley Prouse, another of the Respondent's witnesses, likewise testified to passing out antiunion literature on his own time to employees as they clocked out. (Tr. 106.)

While there are some discrepancies between Andersen's and Davidson's version of their September conversation, both agree that Andersen was instructed by Davidson not to circulate the petition in the plant, with Andersen claiming he was told to remove the petition from the facility, and Davidson stating that he simply instructed Andersen to put it away in his toolbox. I am inclined to believe Davidson's latter claim, for Andersen readily admits that he put the petition in a desk drawer, something I doubt he would have done if, as he contends, he was directed by Davidson to remove the petition from the facility. Andersen did not strike me as someone who was willing to risk being disciplined for insubordination by failing to comply with Davidson's instruction. Rather, I find that Davidson told Andersen only to put the petition away, and did not instruct him to remove it from the facility. I also credit Davidson's claim of

[5] Olson's discharge is not the subject of this litigation. While it is not clear just what Andersen and the other employees hoped to achieve with their petition, Andersen's testimony implicitly suggests that the petition was intended to convey his and the signatory employees' displeasure with what they perceived to be Olson's union-related discharge.

having told Andersen that he could not circulate the petition on company time, but could do so on his lunchbreak or after his working hours. Andersen made no mention in his testimony of being told by Davidson of the restriction on circulating the petition on company time, but being allowed to do so on his lunch break or after his working hours. Moellering, as noted, did recall instructing Davidson to tell Andersen of this restriction. Accordingly, I believe that Andersen was indeed told by Davidson that he could not circulate the petition on company time, but could do so during his lunch break and after his working hours. However, there is nothing in Davidson's testimony, or elsewhere in the record for that matter, to indicate that Davidson explained or defined for Andersen what he meant by "company time" and "working hours."

Bruno Carusi, Jr. works as an EDM operator machinist for the Respondent. He admits being an open union supporter. Carusi testified to being approached by his Supervisor McQueen on August 30, and questioned about his involvement with the Union. He contends, however, that prior to this date, he had not engaged in any organizing activity at the plant. According to Carusi, McQueen approached him inside the plant and asked him to step outside for a talk. Once outside, McQueen asked him if he had called the Union, and Carusi said he had. McQueen purportedly told Carusi that it was rumored that someone had notified Moellering about the Union being called. Carusi explained to McQueen the reasons why he believed a union was needed, including the fact that changes had been made in employee work hours without prior notice, and that a union would protect their interests. Carusi claims that McQueen's August 30, comments to him made him uncomfortable and a little nervous. (Tr. 27.)

During the third week in September, Carusi, as well as employee Swarthout, placed large placards in the windshield of their respective vehicles advertising the Union's website and other related Union information. Carusi believes that employee Andersen may also have placed a similar placard in the latter's vehicle. Carusi testified, without contradiction, that on the day he placed the placard in his truck, he was in the plant when McQueen remarked to him, in passing, that "it looked like someone got into your truck, too." (Tr. 20). McQueen, he contends, said nothing else and continued on.

Carusi described another conversation he had with McQueen on or about October 19, at his work station that began with McQueen telling Carusi that he was an influential person, and then asking Carusi if he was concerned about his job and the jobs of other employees. Carusi answered that he was, but remarked that he was not the only one involved in union activities. McQueen, according to Carusi, then stated that, in his opinion, the only reason the Respondent would maintain a shop in Northern Michigan was because it was nonunion. Carusi reiterated that he was not the only one supporting the union, and that employees had unresolved issues that they believed could be addressed by the Union on their behalf. McQueen did not respond and the conversation ended at that point. (Tr. 17-18.) He construed McQueen's remark to mean that the plant would be closed if it became unionized.

McQueen recalls speaking with Carusi on several occasions. He testified that he and Carusi have been friends since about 1998. In his testimony, Carusi described McQueen as his supervisor and as the one who hired him, but never characterized their relationship as one of friendship. McQueen claims that, at some point, he could not recall when, he began hearing rumors that Carusi was "trying to get a union started" and the one "behind the organizing drive." He contends that the rumors surprised and angered him and that, because of his alleged friendship with Carusi, decided to bring the rumors to his attention. According to McQueen, on a particular day which he did not identify, he took Carusi outside the plant and told Carusi that his name was being thrown around as the one responsible for bringing in the Union,[6] that he, McQueen, was "angered" by the rumor, and that if Carusi was concerned about the rumors, then so be it, "but I'm telling you that I'm hearing your name from other people." Carusi, he contends, admitted that he indeed was trying to get an organizing drive going, and that he had tried unsuccessfully to do so some eight months earlier. (Tr. 78). McQueen denied asking Carusi if he, or anyone else, was supporting the Union, and claims it was Carusi who volunteered the information about his own involvement with the Union.

McQueen recalls having a second conversation with Carusi regarding the Union but provided a much different account. He testified that this second conversation took place outside the plant, not at Carusi's work station, and that, during their conversation, he told Carusi that the Respondent's suppliers might think badly of the Company if a union were brought in because they might perceive the union as a threat, to wit, that a work stoppage might occur. This, he contends, was the extent of this second conversation with Carusi. McQueen did not explain what prompted him to make this remark to Carusi, or who initiated the conversation. However, his claim, that his remark to Carusi about Respondent's customers possibly feeling threatened by the Union was informational in nature, strongly suggests that it was McQueen who first approached and initiated this conversation with Carusi. McQueen denied telling Carusi that the Respondent's reason for maintaining a shop in Northern Michigan was because it was nonunion. (Tr. 79–80.)

As between McQueen and Carusi, I find, based on a careful observation of their demeanor on the witness stand and after a thorough review of their respective accounts of the August 30, and October 19, conversations, that Carusi was the more convincing and credible of the two. Thus, Carusi's description of both conversations was more precise as to when and where they occurred and how long they may have lasted. McQueen, on the other hand, was somewhat vague in recounting his versions of events. McQueen, for example, never identified when these conversations occurred. McQueen also contradicted himself regarding the August 30, conversation, asserting initially that he "took [Carusi] aside and we went out of the plant . . ." where he questioned him about the Union, yet answering "No" when asked by the General Counsel if he took Carusi "outside" to

[6] Despite admitting on direct examination that he took Carusi outside the plant to inform him of the rumors, on cross-examination by the General Counsel, McQueen, somewhat inconsistently, answered, "No" when asked if he took Carusi outside the plant to discuss the rumor. (Tr. 81.)

ask him about the rumors he claimed to have heard about Carusi's union involvement. (Tr. 78, 81). Further, McQueen's representation of having a longstanding friendship with Carusi finds no support in Carusi's testimony, for the latter in his testimony made no claim of being a close friend to, or of having had a longstanding friendship-type relationship with, McQueen. Rather, Carusi simply described and referred to McQueen as his supervisor and as the one who hired him. Indeed, Carusi's claim of feeling uncomfortable and somewhat nervous by McQueen's August 30, inquiry into his union activities casts doubt on McQueen's assertion that he and Carusi were longstanding friends, for Carusi's nervous and troubled reaction to McQueen's questioning of his union activities is, in my view, not consistent with such a relationship. Rather, had Carusi and McQueen truly been long-standing friends, there would have been no reason for Carusi to feel uncomfortable or nervous by McQueen's questioning.

I therefore reject as not credible McQueen's attempt to portray his August 30, questioning of Carusi as innocuous or as nothing more than an innocent query posed by one friend to another. I find instead that McQueen's August 30, inquiry into Carusi's activity was undertaken by McQueen in his capacity as supervisor, not friend, and that the purpose behind the questioning was to ascertain if, and the extent to which, Carusi may have been responsible for the Union's organizing activity. As to the October 19, conversation, I credit Carusi and find that McQueen approached the former at his work station, asked Carusi if he was concerned for his job and that of his fellow employees, and that, when Carusi replied he was and that he was not the only one involved in union activity, McQueen remarked that the only reason the Respondent maintained a facility opened in Northern Michigan was because it was nonunion.

Swarthout is employed as an EDM machine operator with the Respondent. He testified to being an open union supporter, and that, like Carusi, he too placed a Union placard on the windshield of his vehicle in early October. At around 8 a.m. on October 11, he and McQueen were standing by his EDM machine conversing when McQueen remarked, "I see someone put a sign in the window of your Jeep." When Swarthout responded, "Oh, they did?", McQueen, he contends, replied, "Yes, I think you better keep your doors locked because I think someone is trying to get you fired." Swarthout answered, "My doors are locked." McQueen, Swarthout contends, did not explain what he meant by his remark about someone trying to get him fired, but recalls that this conversation occurred soon after his son-in-law Olson was terminated for what Swarthout suspected was Olson's union activity. (Tr. 33-35.)

McQueen's version of his conversation with Swarthout regarding the Union sign on the latter's vehicle is as follows. He claims that sometime in the fall, he noticed the union sign on Swarthout's car and then went into the plant. During the course of that day, he approached Swarthout and commented to him that the latter should keep his vehicle locked because "somebody is putting signs in the window of your Jeep." Swarthout, he contends, remarked, "Those sons-of-guns, I'm going to sit on the roof and see who's doing that," and then made a comment to McQueen about "getting fired." McQueen walked away at that point without saying anything else. He contends that he was simply "kidding around" and being a "smart-aleck" with Swarthout when he told him about the sign on his vehicle, and that he did not know what Swarthout meant by his "getting fired" remark. McQueen denied telling Swarthout that he might or could get fired for having the sign, or threatening him in any way for displaying it. (Tr. 73–74.)

I credit Swarthout over McQueen. From a demeanor standpoint, Swarthout was a more convincing and credible witness who came across as honest and truthful. Conversely, McQueen was, as previously discussed, not a very persuasive witness. Thus, his claim, that he was only kidding around and being smart alecky with Swarthout when he raised the subject of the Union placard with the latter, like his claim that he questioned Carusi about his involvement with the Union because of his alleged friendship with Carusi, is simply not believable. Accordingly, I find that, as credibly testified to by Swarthout, during an October 11, conversation McQueen told Swarthout that he had seen the Union placard on Swarthout's vehicle and then cautioned Swarthout to keep his vehicle locked because someone was trying to get him fired.

B. Discussion

1. The restriction on solicitation

The complaint alleges that the prohibition imposed on Andersen in September against soliciting signatures on the Olson petition was unlawful. As found above, in September, Davidson, on instructions from Moellering, told Andersen that he was not permitted to circulate his petition "on company time" or during "working hours" but could do so during his "lunch break." The Board, however, has long viewed rules prohibiting union solicitation or activities on "company time" or during "working hours" as overly broad and presumptively invalid because they could reasonably be construed as prohibiting solicitation at any time, including an employee's break times or other nonwork periods.[7] See, *Our Way, Inc*., 268 NLRB 394 (1983); also, *Krystal Enterprises Inc*., 345 NLRB No. 15, slip op. at 37 (2005); *A.P. Painting & Improvements, Inc*., 339 NLRB 1206, 1207 (2003); *K.B. Specialty Foods Co*., 339 NLRB 740, 742 (2003); *Becker Group, Inc*., 329 NLRB 103, 109 (1999); *Carry Companies Of Illinois, Inc*., 311 NLRB 1058, 1070 (1993). An employer may nevertheless overcome such a presumption by showing that the rule was communicated to employees in such a way as to convey clearly an intent to permit solicitation during periods and in places where employees are not actually working. *Our Way*, supra. The Respondent has made no such showing here.

Thus, while Davidson, as noted, may have told Andersen of his right to solicit during his lunch break, in the same breath Davidson also told Andersen that he could not engage in such activity on "company time" or during his "working hours," but never explained or defined for Andersen what those terms meant or were intended to cover. Without a clarification, Andersen could reasonably have understood Davidson to mean that his right to solicit was restricted to his lunch break only,

[7] The term "working hours," the Board has noted, connotes periods from the beginning to the end of work shifts, periods that include the employees' own time, such as lunch and break periods.

and that he was precluded from engaging in such activity during his other nonwork periods. Accordingly, I find that the restriction imposed on Andersen against soliciting on "company time" and during his "working hours" was indeed unlawful, and violated Section 8(a)(1) of the Act, as alleged.

2. The McQueen-Carusi conversations

The complaint alleges that McQueen's questioning of Carusi on August 30, amounted to an unlawful interrogation. In determining whether the questioning of an employee constitutes an unlawful, coercive interrogation, the Board applies the totality-of-circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984); See, also, *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *United States Postal Service*, 345 NLRB No. 100, slip op. at (2005).

Under *Rossmore House*, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation as relevant, as well as whether or not the employee being questioned is an open and active union supporter.

McQueen's questioning of Carusi on August 30, regarding his involvement in the Union's organizing campaign served no legitimate purpose and was, I find, clearly coercive. The record reflects that McQueen's inquiry into Carusi's Union activity did not arise in the context of a friendly, casual conversation the two may have been having that day,[8] but rather occurred, as noted, after McQueen, Carusi's immediate supervisor, pulled the latter away from his work station without explanation, took him outside, and abruptly asked him point blank if he was responsible for bringing in the Union. McQueen never told or explained to Carusi why he wanted or needed the information, nor did he provide Carusi with assurances against reprisal. See, e.g., *Midland Transportation Co.*, 304 NLRB 4, 5 (1991). Nor would the fact that Carusi was an open union supporter render McQueen's questioning of him any less coercive, for Carusi also testified, credibly and without contradiction, that prior to the August 30, incident with McQueen, he had not engaged in any open union activity at the plant which, by implication, suggests that his support for the Union may not have yet been known to the Respondent. Indeed, McQueen's August 30, questioning of Carusi as to his involvement with the Union supports

Carusi's assertion that he was not open about his union activities prior to that date. In light of the above facts, I find McQueen's interrogation of Carusi on August 30, was, as previously stated, coercive and unlawful under Section 8(a)(1) of the Act.

The complaint also alleges that McQueen's October 19, statement to Carusi, that the Respondent maintains the facility in Northern Michigan only because it is nonunion, amounted to an unlawful implicit threat of plant closure. The Respondent denies the allegation, noting that McQueen denied making any such statement, and only expressed to Carusi his concern that the Respondent's suppliers might view the Union's arrival on the scene as a threat to production, e.g., through a work stoppage, and, might, consequently, "think badly of or "take exception" to the Respondent, a statement which it contends is protected by Section 8(c). I find merit in the allegation.

First, McQueen's claim of what he said to Carusi on October 19, was rejected as not credible. Rather, according to Carusi's more reliable and credible account of that incident, McQueen approached him at his work station, asked Carusi if he and other employees wanted to keep their jobs. When Carusi answered yes, McQueen commented that he considered Carusi to be an influential individual, and then remarked that the only reason the Respondent kept a facility in Northern Michigan was because it was nonunion. While no explicit threat of plant closure was made to McQueen, implicitly the message conveyed to Carusi by McQueen's remarks, one which I am certain would not have been lost on Carusi, is that, if the facility were to become unionized, the Respondent might close the facility, resulting in Carusi and other employees losing their jobs, and that, to prevent the closure, Carusi should abandon his support for the Union and use his influence to persuade others to do likewise.

Regarding the Respondent's Section 8(c) defense, this latter provision, as the Respondent correctly points out on brief, allows an employer to freely communicate its general views about unionism to its employees, or any of its specific views about a particular union, provided that said communications do not contain a "threat of reprisal or force or promise of benefit." See, *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969); also, *Dallas & Mavis Specialized Carrier Co*., 346 NLRB No. 27 (2006). An employer is also free to make a prediction as to the precise effects it believes unionization will have on the company, provided that the prediction is carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control, or to convey a management decision already arrived at to close the plant in case of unionization. Id. However, if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to it, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. Id.

Nothing in his October 19, implicit threat of plant closure to Carusi suggests that McQueen was simply stating his belief, based on objective facts, of the probable consequences beyond the Respondent's control that might result if the plant were to become unionized. The threat, as noted, focused solely on the Respondent's desire to maintain its facility union-free, and aimed at convincing Carusi and others to abandon their organizational efforts. McQueen's remark is devoid of any reference to economic necessities possibly being a factor in any decision to close, nor does it reflect a closing decision already made by the Respondent. Accordingly, I find that McQueen's October 19, implied threat to Carusi that the plant would close if it became unionized was not protected under Section 8(c), but was instead an unlawful threat of reprisal in violation of Section

[8] As previously found, McQueen's implicit suggestion that his questioning of Carusi was not coercive because he did it out of a concern for, and because of his close friendship with, Carusi is simply not credible and lacking in evidentiary support. McQueen's inquiry into Carusi's Union activity, as noted, made Carusi uncomfortable and somewhat nervous, suggesting that the conversation, at least from Carusi's vantage point, was anything but a friendly one.

8(a)(1) of the Act.

3. The McQueen-Swarthout incident

The complaint also alleges that McQueen unlawfully threatened Swarthout with discharge on October 11, by advising him, after observing a union placard on the windshield of Swarthout's vehicle, to keep his vehicle locked because someone was trying to get Swarthout fired. Although McQueen did not explain his remark to Swarthout, the latter could reasonably have concluded that it was the display of the union placard on his vehicle which could lead the Respondent to view Carusi as a union supporter and result in his discharge for engaging in such activity. Had McQueen's concern in making such a remark been only for the security of Swarthout's vehicle against a possible break-in or theft, he needed only to advise Swarthout to lock his vehicle. The fact that McQueen went on to say that Swarthout risked being fired makes patently clear that McQueen was linking the possible firing of Swarthout to the display of the union placard. Given the recent discharge of his son-in-law, Olson, for what Swarthout believed was Olson's involvement in union activity, Swarthout could reasonably have construed McQueen's remark to mean that Swarthout faced a similar fate if he continued to show support for the Union by displaying the Union placard in his vehicle. In these circumstances, the remark was clearly coercive. As noted, this was not McQueen's first or only attempt to coerce employees into refraining from engaging in union activity, for, as found above, on August 30, he unlawfully interrogated Carusi about his involvement with the Union and, several days after having the instant discussion with Swarthout, he threatened Carusi with plant closure unless he and other employees withdrew their support for the Union. When viewed against his other unlawful conduct, McQueen's remark to Swarthout about being fired for displaying the union placard in his vehicle was, contrary to the Respondent's assertion on brief, anything but a harmless joke. Rather, I find that McQueen's remark was clearly intended as a threat of discharge unless Swarthout removed his Union placard from his vehicle and ceased his support for the Union, and violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By interrogating Carusi on August 30, about his union activity, threatening him on October 19, with plant closure and job loss if the Union were brought in; threatening Swarthout with discharge for having a union placard on his car's windshield, and by prohibiting employee Andersen from soliciting signatures on a union petition on "company time" and during "working hours," the Respondent violated Section 8(a)(1) of the Act.

3. The Respondent's above-described unfair labor practices affect commerce within the meaning of Section 2(6) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To remedy its unlawful conduct, the Respondent shall be required to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Moeller Aerospace Technology, Inc. Harbor Springs, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities; threatening employees with plant closure and loss of jobs if they select the union to represent them; threatening employees with discharge for placing union placards in their vehicles, and precluding them from soliciting other employees on their own free, non-work periods by prohibiting any solicitation on "company time" and during "working hours."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its overly-broad rule against lawful solicitation by employees on "company time" or during "working hours."

(b) Within 14 days after service by the Region, post at its facility in Harbor Springs, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 30, 2005.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 23, 2006.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively interrogate you about your activities, WE WILL NOT threaten you with plant closure and loss of jobs if you select the union as your exclusive bargaining representative, WE WILL NOT threaten you with discharge for placing Union placards in your vehicles or for engaging in any other protected or union activity, and WE WILL NOT prohibit you from lawfully soliciting other employees on your free, nonwork time by prohibiting you from soliciting on "company time" or during "working hours."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our overly broad rule against lawful solicitation by employees on "company time" or during your "working hours."

MOELLER AEROSPACE TECHNOLOGY, INC.